RECENT CASES

Constitutional Law—Validity of Party Resolution Depriving Negro of Right to Vote in Party Primary—[Federal].—The State Democratic Convention of Texas passed a resolution "that all white citizens of the state, who are qualified to vote under the Constitution and laws of Texas shall be eligible for membership in the party and as such shall be eligible for participation in the primaries." The state executive committee of the party declared that the effect of this was to deprive Negroes of the right to vote at the primaries. *Held*, in suit by a qualified Negro voter for mandamus to restrain local officials of the party in charge of the primary from carrying out this order, that petition be dismissed for lack of jurisdiction to grant the relief sought, since the lower federal court had no power to grant a mandamus against state officials. *White v. County Democratic Executive Committee of Harris County*, 60 F. (2d) 973 (S.D. Tex. 1932).

The most interesting portion of the decision is the broad *dictum* of the court to the effect that such action by the convention is unconstitutional as a violation of the Fourteenth Amendment because the state convention is said to be a state "agency" and so the prohibition of the Fourteenth Amendment applies.

This is the latest of a series of cases involving attempts in Texas to disenfranchise Negroes by refusing to allow them to vote at the primaries. The right to vote at the primaries is especially important in a state such as Texas where nomination at the Democratic primary is tantamount to election. The first of these cases, *Nixon v. Herndon*, 273 U.S. 536, 47 Sup. Ct. 446 (1926), held that the Texas Statute (Vernon), art. 3107, which then expressly provided that "in no event shall a Negro be eligible to participate in a Democratic party primary election held in the state of Texas and should a Negro vote in a Democratic primary election such ballot shall be void and election officials shall not count the same," was unconstitutional as discriminatory legislation which fell within the prohibition of the Fourteenth Amendment.

Shortly after this the provision in question was amended to read "Every political party in this state through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in any primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party." Tex. Stat. (Vernon), art. 3107, 1932 App.

The State Executive Committee promptly passed a resolution that "all white Democrats who are qualified under the Constitution and laws of Texas and who subscribe to the statutory pledge of Article 3110 and none other shall be allowed to participate in primary elections. . . . . "

In *Nixon v. Condon*, 286 U.S. 73, 52 Sup. Ct. 484 (1931), the Supreme Court speaking through Mr. Justice Cardozo, ruled that the act of the committee was unconstitutional. Since the executive committee did not have the power inherently to prescribe the qualifications of party membership, it derived the power from the statute and so

had acted in behalf of the state; the Fourteenth Amendment applied and the act was unconstitutional.

However, the Court divided five to four, Mr. Justice McReynolds filing a dissenting opinion which denied that the committee had acted as a state "agency" and so the Fourteenth Amendment had no application. Cf. *Civil Rights Cases*, 109 U.S. 3 (1883) with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

It is interesting to speculate as to why the result in both *Nixon v. Herndon, supra*, and *Nixon v. Condon, supra*, was not based on the fact that in both there was a violation of the Fifteenth Amendment. The reason may have been that the Court did not wish to distinguish or explain away the decision in *Newberry v. United States*, 256 U.S. 232, 41 Sup. Ct. 469 (1921), where it had been held that a direct primary was not an election within the meaning of Article 1, § 4 of the Federal Constitution.

The Court in *Nixon v. Condon, supra*, expressly left open the question of the constitutionality of similar action by the state convention of a political party. See 286 U.S. 73, 83.

Thereupon the State Democratic Convention of Texas passed the resolution quoted above; and it was to test the validity of this action that the instant suit was brought. The rationale of the lower federal court here is that the Democratic party in Texas is a state "agency." However, it is not necessary to go so far to reach the desired result.

In origin at least political parties were voluntary organizations; but for their present place in state government see Merriam & Overacker, Primary Elections (1928), 140. The criteria which should determine the constitutionality of the convention's action are the things actually done by the party and the amount of legislative control which is exercised over party activity.

In *White v. Lubbock*, 30 S.W. (2d) 722, (Tex. 1930), the court dismissed a suit similar to the one brought in the instant case, denying the existence of sufficient connection between state and party to apply the Fourteenth Amendment. Great reliance was placed on *Waples v. Marrast*, 108 Tex. 5, 184 S.W. 180 (1916), which denied the power of the state to use revenue from taxes for the expense of primaries, because such money was to be used only for public purposes. However this case stands alone on the point. Cf. *Commonwealth v. Willcox*, 111 Va. 849, (1911).

It is submitted, however, that there is sufficient regulation of party activity in Texas to make up for the absence of the element of financial support which the Texas court says is the basis of the decision in *Bliley v. West*, 42 F. (2d) 191 (1930), in which a resolution almost identical to the one in the instant case was held invalid. Among the things regulated, even in Texas, are dates of conventions and methods of choosing delegates. For parties polling 100,000 votes or more at the preceding general election the direct primary is made mandatory, and elaborate rules for the conduct of these primaries are set out by the legislature. See Tex. Stat. (Vernon) arts. 3100–3167. For a comparison of the primary laws of various states see Primary Elections, *supra*, 359 *et. seq.*

Where there is such a comprehensive plan of regulation for the nomination of state officers the action of the party so controlled appears essentially to be state action, especially where nomination is practically election.

If such a rationale is adopted the presence of a statute such as the Tex. Stat. (Vernon) art. 3107 is immaterial since the connection between state and party is sufficiently close to warrant the application of the Fourteenth Amendment. It is submitted that

the view taken in the instant case and in *Bliley v. West, supra*, represents the view which the Supreme Court will probably adopt if the question is brought before it, since there is, at least, a violation of the spirit of the Fourteenth Amendment, and the indication of *Nixon v. Condon, supra*, is that the Court will not be prevented from protecting so substantial a right as the franchise of Negro voters by a matter of form.

W. ROBERT MING, JR.

Contracts—Indemnity—Disclosure of Confidential Information—Damages—[England].—Defendant, a subscriber to a mercantile agency (plaintiff) had agreed he would not reveal supplied information and that he would indemnify the plaintiff in respect to any loss or damage which it might suffer or incur directly or indirectly from the breach of this agreement. *Held*, agreement to indemnify was not void as against public policy, but if there was a disclosure leading to damages for libel, without special damage, nominal damages only against the disclosure were recoverable. *Bradstreet's British Ltd. v. Mitchell*, Ch. (1933) 102 L.J.K.B. 34, 48 T.L.R. 670 (1932).

In the United States it is generally held that confidential communications of information to its customers by a mercantile agency, bona fide, and without malice or recklessness are privileged. *Eber v. Dun*, 12 Fed. 526, 4 McCrary 160 (U.S. 1882); *Bradstreet v. Gill*, 72 Tex. 115, 9 S.W. 753 (1888); 1 Cooley, Torts (4th ed.), 557, § 159. England contra. *MacIntosh v. Dun*, L.R. (1908) A.C. 390. Therefore, it is unlikely that this case would arise in the United States since the information was given bona fide, without malice or recklessness.

A contract to indemnify against the consequences of publishing a libel is a contract to indemnify against a wrongful and illegal act and is therefore against public policy and void. *Arnold v. Clifford*, 2 Sumn. 238 (U.S. 1835); *Smith & Son v. Clinton*, 25 L.T.R. 34 (1908). But if a libel is not necessarily contemplated the contract is valid. *Jewett Pub. Co. v. Butler*, 159 Mass. 517, 34 N.E. 1087 (1893). In the principal case the contract was not to indemnify against the result of a libel published, but was a contract not to disclose information with an indemnity in respect to loss or damage due to any such disclosure, and, as such, is not contrary to public policy. Communications made by a principal to an agent or by the agent to a principal relative to subject matter of employment, and containing information or giving directions relative thereto, are privileged, although they contain defamatory matter concerning a third person. *Bohlinger v. Germania Life Ins. Co.*, 132 Iowa 123, 109 N.W. 463 (1906); see 1 Cooley, Torts (4th ed.), 555, § 159. An express term in an agent's contract of employment prohibiting him from disclosing evidence or information obtained is not, therefore, invalid, and in the absence of an express term, such a term may be implied. *Weld Blundell v. Stephens*, H.L. (1920) 89 L.J.K.B. 705, (1920) A.C. 956. Commented on in 19 Col. L. Rev. 249 (1919); 33 Harv. L. Rev. 106 (1919); 40 Can. L. T. 58 (1920); 68 Univ. Pa. L. Rev. 194 (1920); 54 Ir. L. T. 194 (1920); 37 So. Afr. L. J. 440 (1920); 6 Corn. L. Quar. 336 (1921); 69 Univ. Pa. L. Rev. 185 (1921).

It has been suggested that the agreement in the principal case might be wholly void because of uncertainty for the reason that the indemnity called for is against loss or damage incurred directly or *indirectly* by reason of the breach of confidence. 174 L. T. 219 (1932). The decisions seem to bear this out. See 13 C.J., Contracts (1917), 266, § 59.

But where the contract is held valid, as here, the policy of the English courts in requiring a high standard of accuracy in the information which is gathered and disseminated by a mercantile agency would be weakened by imposing upon the subscriber the burden of full indemnity, since the agency would lose an incentive for a high degree of care. The decision, therefore, would seem correct. Cf. 6 Aust. L. Jour. 272 (1932).

BENJAMIN ORDOWER

Contracts—Offer and Acceptance—Silence as Acceptance—[Federal].—The defendant in Texas retained the plaintiff in New York to prosecute a claim on a contingent fee basis. The claim was for $144,000, and the fee was to be twenty-five per cent of the amount recovered. While that suit was pending the now defendant attempted a compromise through a local attorney and telegraphed plaintiff, "must know immediately what will be your fee in the event we accept settlement offered us. Answer quick." Plaintiff specified $12,500 immediately; defendant made no reply. Four months later the local attorney informed the plaintiff that the compromise had been effected (cash $50,000, securities $94,000, note $66,000), whereupon plaintiff had the pending suit dismissed. In defence of this suit for $12,500, it was asserted that since there was no reply to plaintiff's offer to receive that much in settlement, the offer was never accepted. Both sides moved for a directed verdict. *Held,* that plaintiff recover $12,500. *Laredo National Bank v. Gordon,* 61 F. (2d) 906 (C.C.A. 5th 1932), certiorari pending.

The majority of jurisdictions hold that the client must respond in damages for the dismissal without cause of the attorney employed for a specific purpose or period. New York dissents as to employment for a specific purpose and holds the attorney may recover only *quantum meruit* for his services. *Martin v. Camp,* 219 N.Y. 170, 114 N.E. 46, L.R.A. 1917F, 402 (1916), and cases cited therein; *Greenberg v. Remick & Co.* 230 N.Y. 70, 129 N.E. 211 (1920). Orthodox notions of contract support the majority view, while the minority ruling rests on a matter of policy predicated upon the relation of the parties and the desire to avoid litigation by permitting compromises.

Whether the client has the "privilege" or only a "power" to dismiss the attorney without cause, there is no reason why the parties cannot mutually rescind the original contract, contingent upon a successful compromise, and agree upon a definite compensation for the attorney. The court in the principal case decided that the defendant's failure to reply to the plaintiff's telegram constituted the acceptance of an offer looking to such an agreement. Though generally mere silence will create no contractual obligation, "it is at least clear as a matter of law that silence and total inaction of the defendant *may* operate as assent to the formation of the contract." Williston, Contracts (1920), 168, § 91. See also Contracts Restatement (1932), § 72. It should be determined from the particular facts of each case whether it has so operated or not. There are several facts in this case which justify the court's holding. First, the fee set by the attorney was undoubtedly very fair, considering the amount obtained in the settlement and, deducing from that, what the plaintiff might have got had he prosecuted the suit to recovery. Second, the very terms of the telegram would seem to justify the plaintiff in believing, reasonably, that if defendant was not satisfied with the compensation specified he would object within a reasonable length of time. Contracts Restatement (1932), § 72c. Third, the attorney-client relation existing between the parties

would give rise to a certain reciprocal duty of fair dealing. Such duty might well include that of responding to plaintiff's offer which defendant itself had requested. But see 33 Harv. L. Rev. 595 (1920) for criticism of "duty" notion. Lastly, it was the defendant and not the plaintiff who was desirous of terminating the original contract. In this connection it is significant that Texas follows the majority, *Crye v. O'Neal and Allday*, 135 S.W. 253 (Tex. 1911), in holding that a client "breaks" the contract by unwarranted dismissal of the attorney. Hence, if the original contract was entered into in Texas, or the New York rule was not proved, it would seem that if the defendant did not accept the proposed new agreement by its silence, it was guilty of a breach of the old contract. The court might well be disposed in this situation to treat the silence as an acceptance of the plaintiff's offer. Cf. Note, 46 Harv. L. Rev. 846 (1933).

EARL F. SIMMONS

Equity—Jurisdiction of Equity Court to Enjoin Enforcement of a Foreign Equity Decree—Prohibition—[Missouri].— *X*, a resident of Indiana, and an employe of the petitioning railroad company, was fatally injured in Indiana while in the line of his duty. The railroad company, an Indiana corporation, was operating in the states of Indiana and Missouri. *X*'s wife, who was also a resident of Indiana, as administratrix, sued the railroad company under the Federal Employers' Liability Act in the the circuit court of the city of St. Louis, Missouri. The railroad company obtained a permanent injunction in the circuit court of Clinton County, Indiana, restraining prosecution of the suit in the Missouri court. Nevertheless, the administratrix proceeded and recovered a verdict in her favor. The railroad company then moved that she be cited for contempt by the Indiana court. Whereupon, the administratrix obtained an order in the circuit court of the city of St. Louis restraining the railroad company from prosecuting the citation for contempt in the Indiana court. The railroad petitioned the Supreme Court of Missouri for a writ of prohibition against the circuit court of the city of St. Louis, prohibiting it from entertaining jurisdiction of the proceedings to enjoin the railroad from prosecuting the contempt proceedings in the Indiana circuit court. *Held*, the writ of prohibition should be granted. *State ex rel. New York C. & St. L. R. Co. v. Nortoni, Circuit Judge*, 55 S.W. (2d) 272 (Mo. 1932).

The court in its opinion relies on two propositions: first, that the Indiana court had jurisdiction to enjoin the administratrix from prosecuting the suit against the railroad in the Missouri court; second, that the Missouri court did not have jurisdiction to enjoin the railroad from further prosecution of the contempt proceedings.

The first proposition is clearly correct. On the facts of the case, there appears no reason why the general rule that a court of equity has the power to restrain a person within its jurisdiction from prosecuting a suit in another state should not apply. *Fisher v. Pacific Mutual Life Ins. Co.*, 112 Miss. 30, 72 So. 846 (1916); *Ex parte Crandall*, 53 F. (2d) 969 (C.C.A. 7th 1931). Even where the court has been unwilling to assume jurisdiction, the power to grant such injunctions has been freely admitted. *Ill. Life Ins. Co. v. Prentiss*, 277 Ill. 383, 115 N.E. 554 (1917); *Chicago, M. & St. P. Ry. Co. v. McGinley*, 175 Wis. 565, 185 N.W. 218 (1921). Thus the court correctly considered that the right to prosecute in the Missouri court under the Federal Employers' Liability Act was "qualified by the jurisdiction of a court of equity to restrain the bringing of a suit in a foreign jurisdiction provided the facts in the case warrant such action."

The second proposition perhaps deserved more consideration than it was given. This is especially true in the light of the recent Minnesota case of *Peterson v. Chicago, B. & Q. Ry. Co.*, 244 N.W. 823 (Minn. 1932). In this case a lower Minnesota court had granted an injunction restraining the prosecution of contempt proceedings in another state. Upon appeal to the Supreme Court the injunction was affirmed.

On the second proposition, in the present case the Supreme Court held that the lower Missouri court had no jurisdiction to enjoin the railroad company from prosecuting the citation for contempt. In so holding, they say, "It is familiar law that where the jurisdiction of a court and the right of a party to prosecute the proceedings therein have once attached, that right cannot be arrested or taken away by proceedings in another court. *Stevens v. Central Nat. Bank of Boston*, 144 N.Y. 50, 39 N.E. 68." Although the case cited by the court was later reversed, it was upon other grounds. *Central Nat. Bank of Boston v. Stevens*, 169 U.S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807 (1897). From the quotation, it can be seen that the court considers the right to prosecute the contempt proceedings as unqualified and that consequently the right cannot be taken away by an injunction. This is incorrect. The courts of Missouri have recognized the general rule that a court of equity has the power to enjoin a citizen of its own state from instituting or continuing a suit in another jurisdiction. *Grey v. Independent Order of Foresters*, 196 S.W. 779 (Mo. 1917); *Kansas City Rys. Co. v. McCardle*, 288 Mo. 354, 232 S.W. 464 (1921). This rule has not been limited to actions at law, but, on the contrary, has expressly included suits in equity. *Chicago, M. & St. P. Ry. Co. v. Schendel*, 292 Fed. 326 (C.C.A. 8th 1923); *Horst v. Barrett*, 213 Ala. 173, 104 So. 530 (1925). In a New Jersey case, the court determines there is the power to enjoin suits in equity, but they refrain from exercising it for lack of a proper case. *Bigelow v. Old Dominion Copper Co.*, 74 N.J.Eq. 457, 473–485. Although the Minnesota court seems to differ from the Missouri court on the propriety of issuing such an injunction as the one in the principal case, *Peterson v. Chicago, B. & Q. Ry. Co., supra*, is authority for the proposition that the injunction would not be absolutely void. Thus, it is submitted that the equitable right to prosecute the contempt proceedings in the Indiana court is a right qualified by the power of an equity court in Missouri, which has jursidiction of the railroad company, to enjoin the prosecution. Consequently, the Supreme Court of Missouri was wrong in holding on its second proposition that the lower court lacked jurisdiction to entertain the case.

It is submitted that, if this be true, the writ of prohibition should not have issued. The theory upon which such writs are issued is that the lower court has acted in excess of jurisdiction or in usurpation of jurisdiction. *State ex rel. Warde v. McQuillin*, 262 Mo. 256, 171 S.W. 72 (1914); *State ex rel. Fabrico v. Johnson, Circuit Judge*, 293 Mo. 302, 239 S.W. 844 (1922); *Wilkins v. Stiles*, 75 Vt. 42, 52 Atl. 1048 (1901); *Nichols v. Judge of Superior Court of Grand Rapids*, 130 Mich. 187, 89 N.W. 691 (1902). At times, it has been stated that a writ of prohibition would lie to keep a court within the limits of its power in a particular proceeding. *State ex rel. Ellis et al. v. Elkin*, 130 Mo. 90, 30 S.W. 333 (1895); *State ex rel. Sullivan v. Reynolds, Judge*, 209 Mo. 161, 107 S.W. 487 (1907). The language may be due to confusion as to the meaning of the term jurisdiction. Cook, The Powers of Courts of Equity, 15 Col. L. Rev. 106, 107 (1915). As a practical matter, the courts issue the writ only upon the theory that the judgment or order of the lower court is void and can be attacked collaterally. The language of the court in *State v. Elkin, supra*, shows this clearly. In *State v. Reynolds, supra*, also, the court

considers the lower court as lacking in power to appoint a receiver because another court had assumed jurisdiction by appointing a receiver and the assets of the action were in *custodia legis*. The appointment was considered void and the writ of prohibition issued. In the more recent case of *State ex rel. Hyde v. Westhues, Circuit Judge*, 316 Mo. 457, 290 S.W. 443 (1927) the court reaffirmed the general proposition that a writ of prohibition issues only where an inferior court proceeds without jurisdiction or in excess of jurisdiction, and expressly found the act of the lower court to be void before they issued the writ. The injunction restraining the prosecution of the contempt proceedings has been shown not to be void and consequently the writ of prohibition should not have been granted the petitioner here.

Further reason for denying the writ of prohibition might be found in that the petitioner had an adequate remedy at law. It has been held that such a writ will be denied when this is the case. *Mastin v. Sloan*, 41 Mo. 44, 11 S.W. 558 (1889); *State ex rel. Burns v. Shain, Circuit Judge*, 297 Mo. 369, 248 S.W. 591 (1923). That the petitioner's rights might well have been protected by an appeal is shown by the proceedings in the case of *Peterson v. Chicago, B. & Q. Ry. Co., supra.*

One sympathizes with the result of the Missouri case, but in considering the extraordinary nature of the writ of prohibition it would seem advisable to let the petitioner seek his remedy by appeal.

JOHN P. BARNES, JR.

Equity—Specific Performance—Contract to Support Infant—[New York].—Defendant agreed with the infant plaintiff's mother that if she would bring the plaintiff to New York from his uncle's home in Holland, and would permit the defendant to direct the plaintiff's education and religious training, the defendant having the benefits of the infant's companionship, then he, the defendant, would support the plaintiff for life. The plaintiff and his mother performed as far as possible, but after two years the defendant refused to perform further. The mother, as guardian, sued for specific performance. The Special Term's order denying the defendant's motion to dismiss the complaint was affirmed in the Appellate Division, with one judge dissenting on the ground of lack of mutuality, 236 App. Div. 14, 257 N.Y.S. 738 (1932); and reaffirmed in the Court of Appeals. *Weinberger v. Van Hessen*, 260 N.Y. 294, 183 N.E. 429 (1932).

The highest court concluded that the plaintiff, in suing, assumed the duty of full performance, citing *Epstein v. Gluckin*, 233 N.Y. 490, 135 N.E. 861 (1922); and that a decree conditioned upon the plaintiff's continued performance would protect the defendant. However, not only would the infancy of the plaintiff preclude the enforcement of the contract as against him, but the performance required would not be enforced in any event, on account of the delicate personal relationships involved; and it may be doubted whether that performance which the plaintiff might be disposed to render, short of full performance, would be so substantially equivalent, in its proportion to the whole performance contemplated, to the performance required of the defendant during that time, that a conditional decree would in fact be just to the defendant. See notes on the principal case in 17 Minn. L. Rev. 453 (1933), and 46 Harv. L. Rev. 724 (1933); see also 17 Iowa L. Rev. 388 (1932). Compare the cases of contracts to devise in consideration of personal care. *Poe v. Kemp*, 206 Ala. 228, 89 So. 716 (1921); contra, *Davison v. Davison*, 13 N.J.Eq. 246 (1861), and see dictum in *Teske v. Dittberner*, 65

Neb. 167, 91 N.W. 181, 101 Am. St. Rep. 614 (1902). Cf. *Karrick v. Hannaman*, 168 U.S. 328, 18 Sup. Ct. 135, 42 L. Ed. 484 (1897) (partnership); but also *Zelleken v. Lynch*, 80 Kan. 746, 104 Pac. 563, 46 L.R.A. (N.S.) 659 (1909), 23 Harv. L. Rev. 294 (1910) (long-term mining contract).

Aside from the mutuality problem, the question of policy in enforcing such a contract arises on examination of the position of the infant plaintiff. Contracts of parents with third persons, dealing with the custody and control of children, may be enforced where they actually promote the children's welfare; but control is rarely left in the hands of unwilling persons, and parents may not irrevocably divest themselves of their duties by ordinary contract. See *Hohenadel v. Steele*, 237 Ill. 229, 86 N.E. 717 (1908); *Enders v. Enders*, 164 Pa. 266, 30 Atl. 129, 27 L.R.A. 56, 44 Am. St. Rep. 598 (1894); Note, 42 L.R.A. (N.S.) 1013; 7 Minn. L. Rev. 417 (1923). A contract to adopt will not be specifically enforced. *Erlanger v. Erlanger*, 102 Misc. 236, 168 N.Y.S. 928 (1917), aff'd. 185 App. Div. 888, 171 N.Y.S. 1084 (1917). And even arrangements for visiting children are carefully examined. Illinois, Smith-Hurd Rev. Stat. 1931, c. 64, § 4; *Stickles v. Reichardt*, 203 Wis. 579, 234 N.W. 728 (1931), and Comments, 16 Iowa L. Rev. 538 (1931), 15 Minn. L. Rev. 719 (1931).

In the present case, in order to obtain the money for his support, the child would have to submit to such directions with respect to his education as the now unwilling defendant might feel morally obligated to give, which might not be the best arrangement for the child. But only by so binding the plaintiff could the court secure to him the needed support; and perhaps the better solution was reached, in placing the power to terminate the relation, if it should become intolerable, in the plaintiff, who probably stood to lose the most by the termination.

FRED M. MERRIFIELD

Equity Practice—Necessary and Indispensable Parties—Objection of Nonjoinder Raised for First Time by Appellate Court—[Illinois].—Only rarely has an appellate court, on its own motion, raised the objection of the absence of a necessary party to an equity suit. However, this was done recently by the Illinois Supreme Court. A testator devised land to one of his sons, James, for life and at his (James') death to the heirs of his body. If no heirs of James' body survived him, then the land was to go to the testator's heirs. After the birth of James' only son, James and the testator's heirs conveyed the land to *R* for the purpose of destroying the son's interest. A grantee of *R* mortgaged the land to *X*. The son died, and James' divorced wife brought this bill to construe the will, joining as defendants the grantors and grantee in the deed to *R* and subsequent grantees, but failing to join *X*, the mortgagee. A demurrer to the bill was sustained on its merits. No party litigant ever raised the question of the nonjoinder of the mortgagee. *Held*, the mortgagee was a necessary party and the decree for defendants (favorable to the absentee) should be reversed solely because of his absence. *Hauser v. Power*, 183 N.E. 580 (Ill. 1933).

Courts have been very loath to reverse a decree on this ground when no objection was made in the lower court, often stating that an objection made for the first time on appeal is not favored and will not be sustained when the decree is in favor of the absentee's interests, even when the decree is for the complainant, unless the absent par-

ties are clearly indispensable. Some courts have even said the complainant is estopped to raise the question on appeal to reverse a decision unfavorable to him. *Wright v. Scotton*, 13 Del. Ch. 40, 121 Atl. 69 (1923); *Englehard v. Schroeder*, 92 N.J.Eq. 663, 116 Atl. 717 (1921); and see *Winter v. Dibble*, 251 Ill. 200, 95 N.E. 1093 (1911). In *Abernathie v. Rich*, 229 Ill. 412, 82 N.E. 308 (1907), a suit to set aside a deed, complainants failed to join intermediate grantees who had conveyed the land by warranty deed, and the Court said flatly that it would not have reversed the decree for defendants because of complainants' own mistake had not one of complainants been insane. See *Webster v. Jackson*, 304 Ill. 569, 136 N.E. 770 (1922). No case is found where this Court applied the estoppel doctrine to an adult complainant of sound mind.

The serious criticism of *Hauser v. Power* is its assumption that the mortgagee is a person whose presence is so indispensable that no decree can be entered without affecting his interests. No case cited by the Court so holds. In equitable suits attacking defendant's title to property, a grantee, mortgagee, or assignee of defendant is usually held to be a necessary party. *Swanson Auto Co. v. Stone*, 187 Iowa 309, 174 N.W. 247 (1919); *Theriot v. Daigle*, 125 La. 363, 51 So. 292 (1910); *Markwell v. Markwell*, 157 Mo. 326, 57 S.W. 1078 (1900); possibly contra *Billings v. Aspen Co.*, 51 Fed. 338, 350 (C.C.A. 8th 1892); *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429 (1889); *Workman v. Henrie*, 71 Utah 400, 266 Pac. 1033 (1928). But there are degrees of necessity. Federal courts employ the old chancery definition of a necessary party, but if his citizenship is such that to require his joinder will defeat federal jurisdiction, they will dispense with his presence unless he is what they call an "indispensable party," one whose relation to the suit is so direct and vital that without him no adequate decree could be entered determining the rights of the parties; that any decree would affect his interests. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158 (U.S. 1854). See Dobie, Federal Procedure (1928), 213–220.

The cases cited above holding that the grantee or mortgagee from defendant is not a necessary party in suits of this sort seem out of line with the weight of authority, but they cast some light on the relative necessity of the mortgagee's presence. And *Edward v. Mercantile Trust Co.*, 124 Fed. 381 (S.D. N.Y. 1903), holds that a pledgee from defendant of corporate stock is not an "indispensable party"—as the federal courts use the term—to a suit to determine the title of the stock. The court suggests a decree declaring the stock subject to the same lien, if any, that it held at the beginning of the suit. It would seem in the principal case that a similar decree could have been entered in spite of the absence of the mortgagee. If the decree were for defendants, the absentee could not possibly be prejudiced. If it were for complainants he should not be bound. A precedent against the validity of the mortgagor's title has been established, but the mortgagee may have defenses not available to the mortgagor, and even if he has no additional defense there are many cases where one has an unfavorable precedent established against him in his absence. We need not consider the positions of the parties joined, for they have not raised the question. The argument of convenience does not apply either way, for a second trial is necessary in any event. It is submitted that the possibility of prejudice to the mortgagee does not justify this decision, the case having proceeded so far without him.

KENNETH DAVIDSON

Evidence—Insurance—Burden of Proof of Suicide—[Federal].—Insured was shot in his room apparently by his own revolver, the outer door leading to his quarters being locked. Other evidence tended to show that he enjoyed good health, was of cheerful disposition, and had planned an outing that evening. The life insurance policy contained a clause limiting defendant's liability if insured committed suicide within a year from the date of issue. In a suit on the policy there was verdict and judgment for plaintiff. On appeal it was urged that the finding of the jury was against the weight of the evidence. *Held*, the burden of proof of suicide was on the defendant and there was sufficient evidence to justify the jury's finding. *Metropolitan Life Ins. Co. v. Hogan*, 62 F. (2d) 135 (C.C.A. 7th 1932).

The beneficiary of a life insurance policy ordinarily recovers on proof of death. A suicide clause gives defendant an affirmative defense, but defendant has the burden of establishing this defense. *Home Benefit Ass'n. v. Sargent*, 142 U.S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160 (1892); *Ferrero v. Nat'l. Council of Knights, etc.*, 309 Ill. 476, 141 N.E. 130 (1923); 5 Wigmore, Evidence (2d ed. 1923), 500, § 2510 (b). Thus the decision seems sound.

The court may be criticized, however, for broadly stating that in order to overcome the presumption against suicide the insurer must show that death was self-inflicted. The defendant in a suit on a life insurance policy has this burden, not because of any presumption, but because he must establish the affirmative defense of suicide. *Modern Woodmen of America v. Craiger*, 175 Ind. 30, 92 N.E. 113 (1910). Where the plaintiff sues on an accident insurance policy plaintiff has the burden of proving that insured's death was accidental. *Travelers' Ins. Co. v. McConkey*, 127 U.S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308 (1888); *Burkett v. N.Y. Life Ins. Co.*, 56 F. (2d) 105 (C.C.A. 5th 1932); *Wilkinson v. Aetna Life Ins. Co.*, 240 Ill. 205, 88 N.E. 550, 130 Am. St. Rep. 269, 25 L.R.A. (N.S.) 1256 (1909). This is well illustrated by *Mutual Life Ins. Co. v. Gregg*, 32 F. (2d) 567 (C.C.A. 6th 1929), where plaintiffs disclaimed their causes of action on double indemnity riders (on which they would have had the burden of proving accidental death) in order to throw the burden of establishing suicide on defendants.

Some of the cases which apparently put the burden of establishing suicide on the defendant, even though the suit is on an accident insurance policy, may be explained on the ground that the defendants misguidedly pleaded suicide instead of making a general denial, thus tempting the courts into error. *Travelers' Ins. Co. v. Allen*, 237 Fed. 78 (C.C.A. 8th 1916); *Wiger v. Mutual Life Ins. Co.*, 205 Wis. 95, 236 N.W. 534 (1931). See *Landau v. Pacific Mut. Life Ins. Co.*, 305 Mo. 542, 267 S.W. 370 (1924), where the court stated that insurer's affirmative plea of suicide in an action on an accident insurance policy merely served to confuse the issue; the burden of negativing suicide was held to be on plaintiff.

Because of the presumption against suicide, defendant has the burden of going forward even where the suit is on an accident insurance policy. If no evidence is introduced, plaintiff wins. *Messervey v. Standard Accident Ins. Co., etc.*, 58 F. (2d) 186 (C.C.A. 2d 1932), cert. denied 286 U.S. 566, 52 Sup. Ct. 647, 76 L. Ed. 1298 (1931). But the presumption is rebuttable, and vanishes when evidence of suicide is produced. *Pilot Life Ins. Co. v. Wise*, 61 F. (2d) 481 (C.C.A. 5th 1932); *Sawyer v. Mutual Benefit Health and Accident Ass'n.* 121 Neb. 504, 237 N.W. 615 (1931); 8 Tex. L. Rev. 596. Some of the cases demand that the evidence of suicide, if circumstantial, exclude every reasonable hypothesis of accident. *Michalek v. Modern Brotherhood of America*, 179 Iowa 33, 161 N.W.

125 (1917); *Lindahl v. Supreme Court I.O.F.*, 100 Minn. 87, 110 N.W. 358 (1907); *Sweney v. Northwestern Mut. Life Ins. Co.*, 251 Ill. App. 1 (1928). The better view is that not so great a degree of proof is necessary. *Von Crome v. Travelers' Ins. Co.*, 11 F. (2d) 350 (C.C.A. 8th 1926); *Modern Woodmen of America v. Craiger*, 175 Ind. 30, 92 N.E. 113 (1910); *Hawkins v. Kronich Cleaning, etc., Co.*, 157 Minn. 33, 195 N.W. 766, 36 A.L.R. 394 (1923) (overruling the Lindahl case); 23 Col. L. Rev. 286. This difference is due to the fact that the courts holding the former view consider the presumption as evidence.

HUBERT C. MERRICK

Practice—Power of Court To Amend Sentence at Subsequent Term—Probation Act—[Federal].—One Antinori was sentenced to four years imprisonment in 1929, but sentence was suspended and he was placed on probation under the Probation Act, 43 Stat. 1259, 1260 (1925), 18 U.S.C. §§ 724–727 (1926). In 1931 Antinori's probation was revoked and he was sentenced to twelve months' imprisonment. This sentence was affirmed in *United States v. Antinori*, 59 F. (2d) 171 (C.C.A. 5th 1932) and the mandate of affirmance was duly entered by the district court on July 18, 1932. On the same day the defendant district judge undertook to amend the twelve months' sentence to imprisonment for one hour. *Held*, the trial court did not have power to amend the sentence after the mandate of affirmance had been duly entered and the term at which the original sentence of twelve months had been imposed had expired. *United States v. Akerman*, 61 F. (2d) 570 (C.C.A. 5th 1932).

The problem here raised is with regard to the effect of the probation act on the federal court's power to amend sentence after the term at which sentence was imposed has expired. Section 724, 18 U.S.C. (1926) provides for suspension of sentence and probation of the defendant, but: ". . . . The Court may revoke or modify any condition of probation or may change the period of probation." The district court had power to enter the sentence of twelve months imposed in 1931 even though that sentence was imposed after the term of the original sentence had expired. *Riggs v. United States*, 14 F. (2d) 5 (C.C.A. 4th 1926), certiorari denied in 273 U.S. 719, 47 Sup. Ct. 110, 71 L. Ed. 857 (1926); *United States v. Antinori*, 59 F. (2d) 171 (C.C.A. 5th 1932).

The words of the statute are capable of several reasonable interpretations as to just what power the court has over its judgments. Intrinsically the language of the statute could be construed to impart to the courts the power to make what orders they deem advisable, either as to probation or sentence, at any time within the period for which the defendant might originally have been sentenced. Thus the court in the instant case could have imposed the one hour sentence even after term because the period for which defendant might originally have been sentenced does not expire until 1933. This may be an extremely liberal interpretation of the language of the act but it is essentially plausible, especially as, according to the cases, this is legislation of a highly remedial character and as such is entitled to a liberal construction. *Riggs v. United States*, 14 F. (2d) 5, 7, 9 (C.C.A. 4th 1926); *United States v. Chafina*, 14 F. (2d) 622 (D.C. Ariz. 1926); *Reeves v. United States*, 35 F. (2d) 323 (C.C.A. 8th 1929); and see *Beggs v. Superior Court of Santa Clara County*, 179 Cal. 130, 133 *et seq.*, 175 Pac. 642, 644 *et seq.* (1918) (dissenting opinion), for a good discussion of the purpose and construction of such legislation. Under this view the court would have power to make what orders it

deems advisable at any time before the maximum period for which the defendant might originally have been sentenced has expired.

Another possible construction which may be put upon the statute is that which the court in the instant case adopted. See page 570: "The provisions of the act were exhausted when probation was revoked and 'such sentence imposed as might originally have been imposed.' " The court felt that the twelve months' sentence was final in the same way that all criminal sentences were before the probation act and that the court had, therefore, no power to change the sentence after the term at which it was imposed had elapsed. *Ackerson v. United States*, 15 F. (2d) 268 (C.C.A. 2d 1926); *Scalia v. United States*, 62 F. (2d) 220 (C.C.A. 1st 1932).

A third possible interpretation of the language of the act is that contended for by the government in *United States v. Antinori*, 59 F. (2d) 171 (C.C.A. 5th 1932), to wit, that although the act gave the court the power to revoke probation and impose execution of sentence after the term had expired, still the court could not alter the sentence which it had originally imposed. Due to the fact that much of the effectiveness of the probation proceedings depends on the sentence hanging over the head of the defendant and that for this reason the courts impose heavier sentences than they would if the defendant were not to be put on probation, this would work a hardship on the defendant or would hamper the effectiveness of this remedy as administered by the court. Because this is remedial legislation and entitled to liberal interpretation and because this view would seriously prejudice the effective achievement of the purpose of the statute, it is believed that such a construction would be undesirable and palpably inconsistent with the general purposes of the act.

The middle ground of the possible constructions mentioned herein (the one which the court in the instant case adopts) would seem to be the best. The words of the statute do not lend themselves very happily to the construction that the court is empowered to change the sentence when the defendant is no longer on probation, unless the words are expressive of very general powers, but such an interpretation seems to be at least a strain on the language employed by Congress. The salient effect of probation, however, depends so greatly on the indefinite and intimate phenomena of which the trial court is exclusively cognizant that much may be said for the contention that the trial court should be able to control the prisoner up to the time when he is either discharged or actually incarcerated, expiration of terms notwithstanding. The writer feels, however, that such power must come from supplementary legislation and that the court took the most reasonable and most easily justified of the possible constructions available.

CHARLES GRAYDON MEGAN

Suretyship—Liability for Default of Infant Principal—Damages—[Indiana].—Infant vendee of an automobile disaffirmed his conditional sales contract, returned the chattel, and recovered the amount paid to the vendor, who now claims against the sureties on the vendee's purchase note. *Held*, that the vendor should recover the amount of the note (which was substantially the contract price) and that title to the car should pass to the sureties when the note or judgment is paid. *McKee v. Harwood Automotive Co.*, 183 N.E. 646 (Ind. 1932) affirming 162 N.E. 62 (Ind. App. 1928).

Where a person *sui juris* guarantees the obligation of, or becomes surety for a minor,

the surety is bound although the principal is not. *Keokuk County State Bank v. Hall*, 106 Iowa 540, 76 N.W. 832 (1898); *Winn v. Sanford*, 145 Mass. 302, 14 N.E. 119 (1887); *Perkins Goodwin Co. v. Hart*, 83 N.J.L. 471, 83 Atl. 877 (1912). This exception to the general rule that the release or discharge of a principal releases the surety is because the defense of incapacity to contract is personal; the validity of the contract is not affected thereby; and because of the basic reason that the creditor required a surety to assure performance in case the principal disaffirmed. *International Text Book Co. v. Mabbott*, 169 Wis. 423, 150 N.W. 429 (1915); Arant, Suretyship (1931), 170, § 47; 11 Iowa L. Rev. 394 (1926). A number of courts, however, qualify that position. If the infant principal returns the consideration on disaffirmance the surety is not liable to the creditor, they say, for the latter is put in *statu quo*, the consideration of the promise has failed, and the contract under which the surety is liable is at end. *Nations v. Gregg*, 290 Fed. 157 (1923); *Lungequist v. Bakers Bond and Mtg. Co.*, 201 Iowa 430, 205 N.W. 977 (1925); *Baker v. Kennett*, 54 Mo. 82 (1873); *Evants v. Taylor*, 18 N. M. 371, 137 Pac. 583 (1913); *Kyger v. Sipe*, 89 Va. 507, 16 S.E. 627 (1892).

But it would seem that there is no failure of consideration since the creditor's promise to convey or deliver property to the infant is consideration for the surety's promise. Furthermore the creditor has usually performed, and although the infant returns all that he received under the contract the creditor is not only deprived of the benefit of his contract, but ordinarily is not, because of depreciation, placed in *statu quo*. Arant, *op. cit.;* 11 Iowa L. Rev. 394 (1926). Releasing the surety from liability is contrary to the intent of the parties and to business practice.

There is a modern tendency among the courts to hold that an infant who rescinds a contract for personal property and sues to recover payments must be charged for depreciation or use of the property while in his possession. *Meyers v. Hurley Motor Co.*, 273 U.S. 18, 47 Sup. Ct. 277 (1927); *Murdock v. Fisher Finance Corp.*, 79 Cal. App. 787, 251 Pac. 319 (1926); *Sparandera v. Staten Island Garage*, 193 N.Y.S. 392, 117 Misc. Rep. 780 (1921); *Gaither v. Wallingford*, 101 Ore. 389, 200 Pac. 910, 50 A.L.R. 1187 (1921); contra *Rice Auto Co. v. Spillman*, 280 Fed. 452 (1922); *Creer v. Active Auto Exchange*, 99 Conn. 266, 121 Atl. 888 (1923); *Utterstrom v. Kidder*, 124 Me. 10, 124 Atl. 725 (1924); *Godfrey v. Mutual Finance Corp.*, 242 Mass. 197, 136 N.E. 178 (1922); *Greensboro v. Palmer*, 185 N.C. 109, 116 S.E. 261 (1923); *Mast v. Strahan*, 225 S.W. 790 (Tex. 1920). Under the first view the creditor would always be placed in *statu quo* and the surety would be released since the chattel and the amount paid for depreciation or use by the infant would equal the original article. If the court refused to require the infant to deduct for depreciation or use, then the surety could be required to pay the difference between the present value of the chattel at the time of the rescission and the contract price. But requiring the infant or the surety to pay the depreciation does not compensate the creditor for the loss of performance of the contract which is the purpose of requiring a surety. This objection is a very pertinent one and if considered weighty enough is sufficient in itself to warrant a court holding that a surety should pay the creditor the contract price and minimize his loss by selling or using the article which he would obtain by subrogation. 2 Calif. L. Rev. 337 (1914). In this manner the creditor would receive full performance of the contract. This is the position taken by the principal case.

However, to require the surety to take the chattel seems an unnecessary and undesirable hardship. In the main case the creditor was in the business of selling automo-

biles. He not only knew of people desiring to purchase cars, but prospective purchasers sought him. He was in a far more advantageous position to sell the car than the surety would be. Though it may be a burden for the creditor to re-sell the automobile, this works much less hardship than requiring the surety to attempt to dispose of it. The creditor should sell the car, at a forced sale if necessary, and then recover the difference between the sale price and the contract price from the surety. If the surety objects to this result he may pay the creditor the contract price and receive the chattel in return. Otherwise the chattel is disposed of within a reasonable time and the entire transaction reduced to an element of damages. If the article is held for a period of time (in the main case it was six years), the article may greatly depreciate or even become practically worthless. If the creditor sells the chattel soon after the repudiation by the infant he eliminates the loss without any injury to himself, by recovery from the surety of the difference, if any. The burdens of the complicated situation are apportioned and a result most equitable to all parties is reached. Cf. 4 Ind. L. Jour. 206 (1928).

CARL S. POMERANCE

Suretyship—Pro Tanto Subrogation—[Indiana].—Intervenor as surety for *X* bank, a public depository, gave bond for $10,000 which provided that if, on the principal bank's default, the amount paid by the surety did not equal the full amount of the principal's obligation to the obligee, then the surety should not participate in dividends out of the assets of the principal bank until the balance of the obligee's claim was fully satisfied out of such dividends. The *X* bank became insolvent. The plaintiff township board had $11,481.26 on deposit. Intervenor paid its full bonded liability to the plaintiff who assigned in writing to intervenor the plaintiff's claim against the bank to the extent of $10,000. The plaintiff filed a claim in the *X* bank receivership for $1,481.26, and the surety filed an intervening petition in said receivership asserting a right to share proportionately with other creditors in the distributive dividends to the extent of its claim. The trial court upheld the claim of intervenor. *Held*, on appeal, reversed. *Washington Township Board of Finance v. American Surety Company of New York et al.*, 183 N.E. 492 (Ind. App. 1932).

The overwhelming weight of authority states as a general proposition that a surety has no right of subrogation until the claim upon which he is surety has been paid in full or the creditor is completely satisfied. 2 Williston, Contracts (1920), 2306, § 1269; 9 A.L.R. 1596–1607; 25 R.C.L. 1318, § 6; 37 Cyc., Subrogation, 408–409; 60 C.J., Subrogation, 719–721, §§ 28, 29; Sheldon, Subrogation (1893) 190, § 127; Arant, Suretyship (1931), 359, § 79; see also 29 Mich. L. Rev. 753–757 (1931); 37 Harv. L. Rev. 392–393 (1924).

Except for the written assignment following the payment by the surety on its bond, the present case is similar to many other applications of the general rule. *Board of Health v. Teutonia Bank and Trust Company et al.*, 137 La. 422, 68 So. 748 (1915), Ann. Cas. 1916B, 1251; *Banking Commissioners v. Chelsea Savings Bank*, 161 Mich. 691, 125 N.W. 424 (1910), affirmed on rehearing, 161 Mich. 704, 127 N.W. 351 (1910); *Knaffl v. Knoxville Banking and Trust Company*, 133 Tenn. 655, 182 S.W. 232 (1915), Ann. Cas. 1917C, 1181, see also note on 1183; *Blair v. Board of Education of Prairie Township*, 38 Ohio App. 303, 176 N.E. 99 (1930).

The intervenor in the present case insists that these well established principles do not apply since the plaintiff upon receipt of payment of surety bond, executed the following agreement: ". . . . and does hereby assign, transfer, and set over . . . . and does hereby subrogate the said American Surety Company of New York in and to all the rights, claims, choses in action and remedies thereunder of the Washington Township Board of Finance against the State Bank of Westfield to the extent of Ten Thousand Dollars ($10,000.00)." In this respect the present case seems to have gone a step farther than any of the above mentioned authorities. However, the Indiana court seems correctly to have held (in spite of the intervenor's contention that such agreement entitled them to "conventional subrogation"), that such part payment of the total claim of the creditor against the bank did not entitle the intervener to a *pro tanto* subrogation to the rights of the creditor. The court reasoned that the agreement did not clearly show a contract for *pro tanto* subrogation, but that the assignment was to operate only in accordance with the terms of the surety bond. To allow *pro tanto* subrogation in the present case would certainly be highly prejudicial to the creditor whose claim is not fully satisfied, and this would not be justifiable unless the right to *pro tanto* subrogation is clearly expressed in the subsequent agreement, in view of the contrary terms of the surety bond. The rule stated in Sheldon, Subrogation (1893), § 248 at page 373 is, "No claim by subrogation, whether conventional or by operation of law, to the securities held or the remedies enjoyed by the creditor for the collection of his demand, can be enforced, until the whole demand of the creditor has been satisfied. Until then there can be no interference with the creditor's rights or securities which might, even by possibility, prejudice or in any way embarrass him in the collection of the residue of the demand." See also *Board of Health v. Teutonia Bank and Trust Company, supra; Gannett v. Blodgett*, 39 N.H. 150 (1859); *Magee v. Leggett*, 48 Miss. 139 (1873); *Loeb v. Fleming*, 15 Ill. App. 503 (1884); *Fidelity and Deposit Company v. Wilkinson County*, 109 Miss. 879, 69 So. 865 (1915); *United States Fidelity and Guaranty Company v. City of Pensacola*, 68 Fla. 357, 67 So. 87 (1914), Ann. Cas. 1916B, 1236; 37 Cyc., Subrogation, 408–409; 25 R.C.L. 1318, § 6, note 4.

The ruling against giving effect to the assignment in the present case is strengthened by the very essence of the right of subrogation, the existence of which depends not upon a contract but upon the equities of the case involved. 2 Williston, Contracts (1920), 2302, § 1265; Arant, Suretyship (1931), 358, § 79.

FRED O. STEADRY

Torts—Libel—Due Care in Publication of Matter Secured from News Services— [Florida].—Plaintiff sued the defendant newspaper for publication of libellous matter received from the Associated Press and Universal News Service. There was no allegation that defendant was negligent in selecting these agencies or in the publication. *Held*, that the demurrer was properly sustained. *Layne v. Tribune Co.*, 146 So. 234 (Fla. 1933).

The test for libel *per se* is vilifying a man, bringing him into hatred, ridicule, or contempt. *Thorley v. Kerry*, 4 Taunt. 355 (1812); 1 Cooley, Torts (4th ed. 1932), 472, §§ 140, 491, § 145. It is no defense that the defendant merely repeated what had been told him by another whose name he gives, or copies into his newspaper a charge origi-

nating elsewhere or publishes it as a communication or advertisement. *Age Herald Pub. Co. v. Waterman*, 188 Ala. 272, 66 So. 16, 1916E Ann. Cas. 900 (1914); *Spolek Den Hlasatel v. Hoffman*, 204 Ill. 532, 68 N.E. 400 (1903); *Nicholson v. Merrit*, 109 Ky. 369 59 S.W. 25 (1900); *Finnegan v. Eagle Printing Co.*, 173 Wis. 5, 179 N.W. 788 (1920); 18 Am. & Eng. Encyc. of Law, Libel and Slander (2d ed. Garland & McGehee, 1901), 1073; Law of Libel as Applied to Newspapers, 45 Chicago Leg. N. 199. The principal case agrees thus far and also restates the historical view of malice, that while it is the essence of libel, the law will imply malice of the character necessary to support a judgment. *Ray v. Shemwell*, 186 Ky. 442, 217 S.W. 351 (1919); *Stanley v. Prince*, 118 Me. 360, 108 Atl. 328 (1919); *Lewis v. Daily News*, 81 Md. 466, 32 Atl. 246, 29 L.R.A. 59 (1895); *Zanley v. Hyde*, 208 Mich. 96, 175 N.W. 261 (1919); *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922). But implied malice taken over from the ecclesiastical courts is merely a useless fiction retained from the form of the declaration and the failure of the judges to admit that the law has been changed by decision. *Coleman v. Mac Lennan*, 78 Kan. 711, 98 Pac. 281 (1908); *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N.E. 462, 20 L.R.A. 856 (1893); *Jones v. Hulton*, L.R. (1910) A.C. 20; Bower, Code of Law of Actionable Defamation (1908), appendix 2, 271; N. St. John Green, 6 Am. Law. R. 609–610; Odgers, Libel and Slander (6th ed. 1929), 4–5, 281–282; Jeremiah Smith, Jones v. Hulton, 60 Univ. Pa. L. Rev. 365, 461, 463, note 10 for citations; 1 Street, Foundations of Legal Liability (1906), 317. The principal case turns on the misstated point that, following the ancient rule that one who heard a slander was not liable for repeating it in the same words, naming his authority, the newspaper is not liable for publication of news of reputable agencies. The old law was that the publication coupled with the yielding up of the original publisher's name in such a way as to give the plaintiff a complete cause of action against him was a good plea, but the mere statement of the source was insufficient. *Davis v. Lewis*, 7 Term Rep. 17 (1796); *Maitland v. Goldney*, 2 East. 426 (1802); repudiated in *McPherson v. Daniels*, 10 B. & C. 263 (1829); Bower, Code of Law of Actionable Defamation (1908), 302. The principal case takes a stand even beyond the English publishers' cases allowing the defendant to escape liability by showing (1) innocence of knowledge of libel, (2) absence of anything in the work or circumstances which should have led him to the belief that it contained a libel, and (3) lack of negligence on his part. *Emmens v. Pottle*, 16 Q.B.D. 354, 2 T.L.R. 115 (1885); *Vizetelly v. Mudie Select Library*, (1900) 2 Q.B.D. 170; *Bottomley v. Woolworth Co. L'td.*, 48 T.L.R. 521 (1932), since it casts the entire burden on the plaintiff; contra, *Sweet v. Post Pub. Co.*, 215 Mass. 450, 102 N.E. 660, 47 L.R.A. (N.S.) 240, 1914D Ann. Cas. 532 (1913); *Corrigan v. Bobbs Merrill Co.*, 228 N.Y. 58, 126 N.E. 260, 10 A.L.R. 662 (1920). The theory of the court seems to be a conglobation of Holmes' objective theory of culpability (*Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N.E. 462, 20 L.R.A. 856 (1893) and Note, 38 Harv. L. Rev. 1100), the theory of *per quod libel* to be applied only where the newspaper receives news service from a reputable service. The importance to the state and to society of prompt news of daily happenings and the slight chance of injury to a private character seems to justify the decision.

GERALDINE W. LUTES

Treaties—Extradition—Receiving Money Knowing It To Have Been Fraudulently Obtained—[Federal].—The appeal is from an order of the Federal District Court dis-

charging the appellee on habeas corpus from custody under commitment by the United States Commissioner for rendition to England from Illinois where he was found. The complaint of the British government is that the appellee received certain sums of money knowing the same to have been fraudulently obtained, a crime made extraditable by the Hay-Pauncefote Treaty concluded between Great Britain and the United States in 1889. The motion to dismiss the appeal was denied by the Circuit Court of Appeals and the order of the Federal District Court was reversed, the cause being remanded to the lower court with directions to discharge the writ of habeas corpus. (Evans, J., dissenting). *Laubenheimer v. Factor*, 61 F. (2d) 626 (1932).

An offense in order to be extraditable must be (1) enumerated in the treaty, (2) made criminal by the laws of the demanding state, and (3) one for which the accused could be held for trial in the state of asylum. Treaty of 1842, Art. 10, 8 Stat. 572; Treaty of 1889, Art. 1, 26 Stat. 1508; *United States v. Rauscher*, 119 U.S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425 (1886); *Wright v. Henkel*, 190 U.S. 40, 23 Sup. Ct. 781, 47 L. Ed. 198 (1903); *Collins v. Loisel*, 259 U.S. 309, 42 Sup. Ct. 469, 66 L. Ed. 956 (1922).

Under the Treaty of 1889, which controls in this case, the offense in order to be extraditable must be a crime against the law of the state in which the fugitive is found and not merely a crime under the statutes of the United States. *Pettit v. Walshe*, 194 U.S. 205, 24 Sup. Ct. 657, 47 L. Ed. 938 (1904).

Receiving money knowing it to have been fraudulently obtained is an extraditable offense within the Treaty of 1889, Art. 2, Classification 14. Such act, too, was made criminal by the laws of Great Britain. Larceny Act of 1916, 6 & 7 Geo. V, c. 50, § 33.

The crucial question of the case is whether or not receiving money knowing it to have been fraudulently obtained is a crime in Illinois. This, the lower court held, is a question of fact. To this end, jurists were called as expert witnesses. Each testified that as a matter of fact the receiving of money knowing it to have been fraudulently obtained is not a crime in Illinois—that it is no crime at common law and that there is no Illinois statute changing the common law. The admission of this testimony was held to be erroneous by the Circuit Court of Appeals because the federal courts are deemed to take judicial notice of the laws of the several states. *Owings v. Hull*, 9 Pet. 607 (1835).

An Illinois statute makes it an offense to receive stolen property. Cahill's Ill. Rev. Stat. 1931, c. 38, par. 507. But it is not applicable here since the state Supreme Court has expressly held that obtaining title to property by fraud is not larceny. *Murphy v. People*, 104 Ill. 528 (1882); *People v. Barnard*, 327 Ill. 305, 158 N.E. 729 (1927).

The only possible means by which the act charged could be deemed criminal in Illinois is its being interpreted as a violation of the Fraudulent Conveyance Act. Cahill's Ill. Rev. Stat. 1931, c. 38, par. 294. The act is designed to penalize fraudulent conveyances made with the intention on the part of both participants to defraud creditors of the transferor. *Behrens v. Steidley*, 198 Ill. 303, 64 N.E. 1113 (1902). This element is lacking in the instant case.

The real basis for the reversal, however, is a prior decision in this matter reached by the United States Supreme Court. In passing on a writ of *habeas corpus* for the defendant's release from commitment for extradition from Illinois to Canada, it was held, "the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois." *Kelly v. Griffin*, 241 U.S. 6, 36 Sup. Ct. 487,

60 L. Ed., 861 (1916). This decision, the court in the present case holds, is binding on every inferior court in the United States on matters of international extradition. The holding of the court rather than the course of reasoning whereby the holding was reached is regarded. This is a rather dubious attitude in light of the fact that the circumstantial situations of the two cases differ essentially.

In the Kelly case, the crime charged was not the receiving of money knowing it to have been fraudulently obtained, but the receiving by Kelly of government money from government officials knowing that they had obtained it from the government by fraud. The decision merely held that it was a crime in Illinois to receive public money known to have been fraudulently obtained by public officers. Reliance was placed upon 20 Stat. 280 of the United States. That statute relates only to the obtaining of public funds from governmental agents and does not cover the broader offense of receiving private money knowing it to have been fraudulently obtained. It would seem that this statute does not apply to the present case, and it is doubtful whether the *Kelly v. Griffin* decision should be controlling here.

The matter has been brought before the United States Supreme Court on a writ of certiorari and it is probable that, due to the extra-legal aspects of the case, the decision of the Circuit Court of Appeals will be affirmed. This indication is strengthened by the fact that the trend of the Court is to interpret treaties broadly, thus facilitating the rendition of alleged offenders against the laws of friendly nations. See *Grin v. Shine*, 187 U.S. 181, 184, 23 Sup. Ct. 98, 100 (1902).

LOUIS TERKEL

Workmen's Compensation—Basis of the Action—[Illinois, Missouri].—Two recent cases present the problem of whether proceedings under workmen's compensation acts are *ex contractu* or *ex delicto*. In *Keller v. Industrial Commission et al.*, 350 Ill. 390, 183 N.E. 237 (1932), the claimant instituted proceedings under Ill. Smith-Hurd Rev. Stat. 1931, c. 48, §§ 138 *et seq.*, for the deaths of her two sons from injuries arising out of and in the course of their employment by their step-father. The defense was the common-law disability of a wife to sue her husband in tort. In *Hope v. Barnes Hospital*, 55 S.W. (2d) 319 (Mo. App. 1932), proceedings were instituted under Mo. Rev. Stat. 1929, §§ 3299 *et seq.*, for the death of the claimant's husband from injuries sustained in the course of his employment by a charitable institution. The defense was the exemption of an eleemosynary institution from tort liability, on the theory of a trust whose fund may not be depleted by the payment of damages for the negligent acts of the trustees. *Held*, in each case, that the action was *ex contractu* and the defense invalid.

The decision in the Hope case, indeed, was based on the statute, *supra*, § 3299, making the remedy contractual and elective on the part of the employer (whose acceptance, however, is presumed, § 3300, and was not negatived in the principal case). But even in the absence of a statutory declaration, as in the Keller case, the same result should be reached, on principle and according to authority. As said by the Illinois court, a tort action arises from the wrongful conduct, intentional or negligent, of the defendant; while under the above statutes, the employer's fault is not in issue, and even the employee's contributory negligence may not bar recovery. 350 Ill. 390, 397, 183 N.E. 237, 240. The statutory provisions are read into the labor contract by law; an ac-

tion thereon, consequently, sounds in contract. *Walsh v. Waldron & Sons*, 112 Conn. 579, 153 Atl. 298 (1931); *Reutenik, Adm'r., v. Gibson Packing Co.*, 132 Wash. 108, 231, Pac. 773 (1924); 6 R.C.L. 855. The result of both cases is in accord with the majority view in the United States. *The Linseed King*, 48 F. (2d) 311 (1929); *Previslen v. Derby & Ansonia Developing Co.*, 112 Conn. 129, 151 Atl. 518 (1930); *Landry v. Shinner*, 344 Ill. 579, 176 N.E. 895 (1931); *Moeser v. Shunk*, 116 Kan. 247, 226 Pac. 784 (1924); *Wood v. Vroman*, 215 Mich. 449, 184 N.W. 520 (1921); *Narozniak v. Perdek*, 162 Atl. 118 (N.J.L. 1932); *Hoover v. Globe Indemnity Co.*, 202 N.C. 655, 163 S.E. 758 (1932). A few courts have held that the action is, properly, neither *ex contractu* nor *ex delicto*. Thus in Wisconsin, it is regarded as a new, statutory remedy, dependent for its existence on the relationship of employer and employee. *Van Blatz Brewing Co. et al. v. Gerard et al.*, 201 Wis. 474 ,230 N.W. 622 (1930). In California, it is regarded as *quasi ex contractu*, a compulsory liability attached by statute to the labor contract. *Los Angeles Shipbuilding & Drydock Co. v. Industrial Accident Commission of Cal. et al.*, 57 Cal. App. 352, 207 Pac. 416 (1922). All reach the same result; hence it is submitted that the courts in the principal cases properly held that the defenses urged were not legal bars to the actions.

LEO SEGALL